UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 138

Docket No. SF-0353-09-0587-I-1

Lois M. Johnson,

Appellant,

v.

United States Postal Service,

Agency.

July 15, 2010

Dallas J. Jones, Jr., Washington, D.C., for the appellant.

Carla Ceballos, Esquire, Long Beach, California, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant has petitioned for review of the initial decision that dismissed her restoration appeal for lack of jurisdiction. For the reasons set forth below, we DENY the petition for failure to meet the Board's review criteria under 5 C.F.R. § 1201.115(d), REOPEN the appeal on the Board's own motion under 5 C.F.R. § 1201.118, REVERSE the initial decision, and REMAND the appeal for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 The appellant, a Mail Handler at the Los Angeles Bulk Mail Center (BMC) in Bell, California, was injured on duty on January 7, 2005. IAF, Tab 2 at 1, 9-10. She applied for and received benefits from the Office of Workers' Compensation Programs (OWCP) based on her claims for a sprain/strain of the neck and lumbar. *Id*. at 9-10. The agency subsequently created various limited duty, modified assignments to fit within the appellant's medical restrictions, and, most recently, she accepted a Modified Mail Handler assignment on January 22, 2009. IAF, Tab 6 at 11-12.

¶3 On April 8, 2009, the agency informed the appellant that, in connection with the National Reassessment Process (NRP) 2 Pilot Program through which the agency was reassessing all rehabilitation and limited duty, modified assignments, it was unable to identify a position within her current medical restrictions and within her regular duty hours at the Los Angeles BMC that met the agency's operational needs. IAF, Tab 6 at 38. The appellant, therefore, was directed to leave work for the remainder of the day and not report again for duty unless she was informed that operationally necessary work tasks had been identified for her within her medical restrictions. *Id*. She was also informed that her options were to apply for Continuation of Pay (if eligible), leave, or leave without pay-injured on duty. *Id.*

¶4 On May 8, 2009, the appellant filed an appeal with the Board, asking to be returned to her job with back pay to restore the difference between the rate of pay that she was receiving from OWCP and her full duty pay. IAF, Tab 2 at 4. She requested a hearing. *Id.* at 2. The appellant contended in her appeal that three other employees had been allowed to continue in their limited duty assignments. *Id*. at 4. The appellant also claimed that the agency had discriminated against her, *id*. at 6, and she submitted a grievance form in which she had argued that the agency failed to reasonably accommodate her, *id.* at 14-15. On June 19, 2009, while the appeal was pending, the agency restored the appellant to duty in a

limited duty, modified Mail Handler position, which involved different duties than her prior limited duty assignment. *Id.*, Tab 14 at 8-10, 11-12.

¶5 Because the appellant is not a preference eligible Postal employee or a supervisory, management or confidential employee with Board appeal rights under Chapter 75, the administrative judge properly interpreted the case as a restoration appeal of a partially recovered employee, and informed the appellant of her jurisdictional burden for this type of appeal. IAF, Tabs 3, 10. After receiving responsive submissions from the parties, the administrative judge dismissed the appeal for lack of jurisdiction without holding the appellant's requested hearing. IAF, Tab 17. The administrative judge found that the appellant had failed to make a nonfrivolous allegation that the agency's April 8, 2009 determination that there was no work available within her medical restrictions was an arbitrary and capricious denial of restoration. *Id.* at 4-5.

¶6 The appellant filed a timely petition for review. PFR File, Tab 1. The agency has not responded.

ANALYSIS

Denial of Restoration

¶7 The Federal Employees' Compensation Act and its corresponding regulations at 5 C.F.R. part 353 provide that federal employees who suffer compensable injuries enjoy certain rights to be restored to their previous or comparable positions. 5 U.S.C. § 8151; *Walley v. Department of Veterans Affairs*, 279 F.3d 1010, 1015 (Fed. Cir. 2002); *Tat v. U.S. Postal Service*, 109 M.S.P.R. 562, ¶ 9 (2008). In the case of a partially recovered employee, i.e., one who cannot resume the full range of regular duties but has recovered sufficiently to return to part-time or light duty or to another position with less demanding physical requirements, an agency must make every effort to restore the individual to a position within his medical restrictions and within the local

commuting area. *Delalat v. Department of the Air Force*, 103 M.S.P.R. 448, ¶ 17 (2006); 5 C.F.R. §§ 353.102, 353.301(d).

¶8 "An individual who is partially recovered from a compensable injury may appeal to the MSPB for a determination of whether the agency is acting arbitrarily and capriciously in denying restoration." 5 C.F.R. § 353.304(c). To establish Board jurisdiction over a restoration claim as a partially recovered employee, an appellant must make a nonfrivolous allegation that: (1) She was absent from her position due to a compensable injury; (2) she recovered sufficiently to return to duty on a part-time basis, or to return to work in a position with less demanding physical requirements than those previously required of her; (3) the agency denied her request for restoration; and (4) the agency's denial was "arbitrary and capricious." *Chen v. U.S. Postal Service*, 97 M.S.P.R. 527, ¶ 13 (2004); *see* 5 C.F.R. § 353.304(c).

¶9 In this case, the appellant made nonfrivolous allegations satisfying the first three jurisdictional criteria. IAF, Tab 12 at 1-2. The appellant's allegations in this regard are supported by the record evidence. IAF, Tab 6, Exhibit (Exh.) 12; *see Brehmer v. U.S. Postal Service*, 106 M.S.P.R. 463, ¶ 9 (2007) (discontinuation of a limited duty position may constitute a denial of restoration for purposes of Board jurisdiction under 5 C.F.R. part 353). Thus, the first three jurisdictional criteria for the appellant's restoration claim as a partially recovered employee are satisfied. *See Chen*, 97 M.S.P.R. 527, ¶ 13; 5 C.F.R. § 353.304(c).

¶10 Although the appellant's documentary submissions themselves are insufficient to satisfy the fourth jurisdictional criterion, the agency's documentary submissions are sufficient to render nonfrivolous the appellant's allegation that the denial of restoration was arbitrary and capricious. *See Baldwin v. Department of Veterans Affairs*, 109 M.S.P.R. 392, ¶¶ 11, 32 (2008) (the Board may consider the agency's documentary submissions in finding that an appellant has made a nonfrivolous allegation of Board jurisdiction). The Office of Personnel Management's regulations provide:

> Agencies must make every effort to restore in the local commuting area, according to the circumstances in each case, an individual who has partially recovered from a compensable injury and who is able to return to limited duty. At a minimum, this would mean treating these employees substantially the same as other handicapped individuals under the Rehabilitation Act of 1973, as amended.

5 C.F.R. § 353.301(d). The Board has interpreted this regulation as requiring agencies to search within the local commuting area for vacant positions to which an agency can restore a partially recovered employee and to consider him for any such vacancies. *See Sanchez v. U.S. Postal Service*, 2010 MSPB 121, ¶ 12; *Sapp v. U.S. Postal Service*, 73 M.S.P.R. 189, 193-94 (1997). "For restoration rights purposes, the local commuting area is the geographic area in which an individual lives and can reasonably be expected to travel back and forth daily to his usual duty station." *Hicks v. U.S. Postal Service*, 83 M.S.P.R. 599, ¶ 9 (1999). It includes any population center, or two or more neighboring ones, and the surrounding localities. *Sapp*, 73 M.S.P.R. at 193. The question of what constitutes a local commuting area is one of fact. The extent of a commuting area is ordinarily determined by factors such as common practice, the availability and cost of public transportation or the convenience and adequacy of highways, and the travel time required to go to and from work. *See Beardmore v. Department of Agriculture*, 761 F.2d 677, 678 (Fed. Cir. 1985) (defining "local commuting area" in the context of a reassignment).

¶11 In this case, the agency's documentary submissions show that its job search was limited to the appellant's facility. IAF, Tab 6, Exh. 12. Evidence that the agency failed to search the commuting area as required by 5 C.F.R. § 353.301(d) constitutes a nonfrivolous allegation that the agency acted arbitrarily and capriciously in denying restoration. *See Barachina v. U.S. Postal Service*, 113 M.S.P.R. 12, ¶ 7 (2009); *Urena v. U.S. Postal Service*, 113 M.S.P.R. 6, ¶ 13 (2009). We therefore find that the appellant has met all of the criteria to establish

Board jurisdiction over her restoration appeal, which entitles her to adjudication on the merits. *See Barrett v. U.S. Postal Service*, 107 M.S.P.R. 688, ¶ 8 (2008).

Impact of the Appellant's Post-Appeal Restoration to Duty

¶12 We note that the appellant was returned to full-time duty on June 19, 2009, IAF, Tab 14 at 8-10, more than a month after this appeal was filed and more than 2 months after the agency sent the appellant home. The fact that the agency restored the appellant after the appeal was filed does not deprive the Board of jurisdiction. *See Himmel v. Department of Justice*, 6 M.S.P.R. 484, 486 (1981) (the Board's jurisdiction is determined by the nature of an agency's action against a particular appellant at the time an appeal is filed with the Board). Still, the agency's action can be considered on remand in determining whether it acted arbitrarily and capriciously. The Board has held that an agency's delay in restoring an employee after a compensable injury may not be arbitrary and capricious under certain circumstances. *See Hardy v. U.S. Postal Service*, 104 M.S.P.R. 387, ¶ 21 (the agency's delay was not arbitrary and capricious where it had received conflicting reports concerning the appellant's ability to return to work), *aff'd*, 250 F. App'x 332 (Fed. Cir. 2007). On remand, the administrative judge should determine whether the agency's actions with respect to the appellant, including the geographic scope of its search for work and its delay in providing work, were arbitrary and capricious.

Interplay with the Rehabilitation Act

¶13 Because the Board has jurisdiction to consider the merits of the restoration appeal, the administrative judge must also adjudicate the appellant's disability discrimination claim.[*] *See* 5 U.S.C. § 7702(a)(1); *Barrett*, 107 M.S.P.R. 688, ¶ 8.

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[*] We find that the appellant's indication in her appeal that she intended to raise a claim of discrimination, IAF, Tab 2 at 6, and the argument in the attached grievance form that the agency failed to reasonably accommodate her, *id.* at 14, are sufficient, considered together, to raise a claim of disability discrimination.

As discussed in *Sanchez*, 2010 MSPB 121, ¶ 18, the reassignment obligation under the Rehabilitation Act of 1973, which mandates reasonable accommodation for persons with disabilities, is not necessarily confined geographically to the local commuting area. *Id.* Under the restoration regulation at 5 C.F.R. § 353.301(d), however, an agency's responsibility in the restoration context is limited to the local commuting area. *Id.*

¶14 We make no determination as to the agency's particular reassignment obligation under the Rehabilitation Act in this case. Rather, the administrative judge should address this issue on remand in the context of the appellant's disability discrimination claim. *See* IAF, Tab 2 at 6, 14; *cf. Sapp v. U.S. Postal Service*, 82 M.S.P.R. 411, ¶¶ 13-15 (1999) (finding that the appellant's restoration rights and right to reassignment under disability discrimination law are not synonymous and require separate adjudication) (clarifying *Sapp*, 73 M.S.P.R. at 194-95). The administrative judge should take into consideration the results of the interactive process required to determine an appropriate accommodation. *See Paris v. Department of the Treasury*, 104 M.S.P.R. 331, ¶ 17 (2006); 29 C.F.R. § 1630.2(o)(3); *see also Equal Employment Opportunity Commission Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act* (2002) at 6. "Both parties . . . have an obligation to assist in the search for an appropriate accommodation, and both have an obligation to act in good faith in doing so." *Collins v. U.S. Postal Service*, 100 M.S.P.R. 332, ¶ 11 (2005) (citing *Taylor v. Phoenixville School District*, 184 F.3d 296, 312 (3d Cir. 1999)).

ORDER

¶15 Accordingly, we REMAND the appeal for further adjudication consistent with this Opinion and Order.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board
Washington, D.C.